No. 89-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Petitioners,
v.
UNITED STATES CATHOLIC CONFERENCE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS UNITED STATES CATHOLIC CONFERENCE AND NATIONAL CONFERENCE OF CATHOLIC BISHOPS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do abortion-rights advocates, whose own tax status is not at issue, have standing to challenge the tax exemptions of over 30,000 Roman Catholic Church entities?

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COUNTER-STATEMENT OF THE CASE

Petitioners' statement of the case omits two important points. First, it neglects to mention the supplementary, *per curiam* opinion issued by the court of appeals panel in this case when it denied the petition for rehearing. That opinion squarely rejects

petitioners' assertion, at pages 33-37 of their present petition, that the panel's decision conflicts with another decision of that same court, *Fulani* v. *League of Women Voters Educ. Fund*, 882 F.2d 621 (2d Cir. 1989).[1] In denying rehearing, the panel unanimously announced that, although it was "divided as to whether the plaintiffs are sufficiently in competition with the Catholic Church to have suffered injury that confers standing, [it was] in agreement that the competition in *Fulani* is more direct and immediate than that shown here." Appendix to the Petition for a Writ of Certiorari ("Pet. App.") 86a; see *infra*, at 20-22. The panel thus denied rehearing.[2]

Second, petitioners' statement omits a sufficient description of their complaint and of the subpoenas they served upon respondents United States Catholic Conference and National Conference of Catholic Bishops ("USCC/NCCB").[3] Petitioners seek an injunction ordering the government to "revok[e] the tax exemption of the Roman Catholic Church," on

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[1] In fact, pages 33-37 of the petition for a writ of certiorari are taken largely verbatim from the petition for rehearing in the court of appeals.

[2] Petitioners do include the opinion as the last item of their appendix, but they never mention its existence, nor even list it in the "Opinions Below" section of their petition. Indeed, petitioners' only references even to their *petition* for rehearing are in the Jurisdiction section of their petition, and in the final footnote, where they speculate, without discussing the existence of a written opinion, what "appears" to have motivated the court of appeals to deny their petition. Petition for a Writ of Certiorari, at 35 n. 12.

[3] The United States Catholic Conference and National Conference of Catholic Bishops are distinct organizations with identical memberships. Each is composed of all active Roman Catholic Bishops in the United States.

the purported ground that some or all of its over 30,000 separate entities have engaged in impermissible political activities. Amended Complaint ("Am. Compl.") ¶ 60.[4] The affected Church entities, all of which are covered by an annual group exemption letter, include not only respondents USCC/NCCB, but also virtually every Catholic diocese, parish, elementary and high school, college, seminary, hospital, home for the aged or infirm, orphanage, counseling center, monastery, retreat house, and refugee assistance group in the country.[5] Petitioners' complaint also seeks an order requiring the IRS to assess and collect all resulting back taxes, and to notify the Church's contributors that they may not claim charitable tax deductions for their contributions. *Ibid.*

The petitioners allege no IRS enforcement actions, or threatened enforcement actions, against themselves personally or against their churches or organizations. Nor do they seek tax refunds or any change in their tax status. Their amended complaint alleges only, "[u]pon information and belief, . . . [that] Roman Catholic priests and other Church officials have actively and systematically participated in political campaigns in all parts of the country . . . ." Am. Compl. ¶ 25. It further alleges, again "[u]pon information and belief," that "[m]any Catholic priests and other Church officials . . . have, from their pulpits, regularly and repeatedly urged their congregants to donate to 'right-to-life' committees and po-

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[4] See Joint Appendix in No. 87-416 ("JA"), at pages 5-19.

[5] The group ruling, which is issued to the USCC, covers all entities listed in *The Official Catholic Directory*, including more than 185 dioceses, 19,546 parishes, 7,485 elementary schools, 1,408 high schools, 238 colleges, 645 hospitals, and numerous other Catholic entities. See JA at 24-27.

litical parties, to obtain (often in the church parking lot following the service) 'right-to-life' campaign literature, to sign the nominating petitions of 'right-to-life' candidates. At least one church has distributed 'right-to-life' leaflets with the church bulletin." *Id.* ¶ 26. Petitioners allege that a policy statement adopted by the NCCB in 1975, the Pastoral Plan for Pro-life Activities,[6] is the "blueprint for the Church's illegal activities." *Id.* ¶ 21.[7]

Pursuant to this complaint, petitioners served subpoenas *duces tecum* on USCC/NCCB, demanding the production of voluminous internal Church documents relating to the Church's position on abortion and to its communications with the IRS. The subpoenas demanded, among other things: (1) all drafts of the 1975 Pastoral Plan, which states the U.S. bishops' theological, moral and social position on abortion, (2) the minutes of the bishops' discussions of the Pastoral Plan's proposed contents, and all documents relating to its implementation; (3) all "Church Bulletins, clergy Bulletins, Pastoral letters, directives, memoranda, or similar documents issued or promulgated by any" bishop in the United States to any other person concerning the Pastoral Plan; (4) all documents reflecting contact with any candidates for public office anywhere in the United States; (5) all documents reflecting financial support or "involvement" of USCC/NCCB, "or any state Catholic conference, archdiocese, diocese, or parish church," or any "church personnel" (defined to include every em-

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[6] The language in the 1975 Pastoral Plan of which the petitioners complain was amended in 1985.

[7] USCC/NCCB, of course, concede neither the truth of the factual allegations of the complaint nor the validity of the legal conclusions.

ployee of each of those organizations), with twelve national and state pro-life organizations; (6) USCC/NCCB's tax or information returns and, "without limitation, all correspondence, memoranda or other communications relating to the consideration or approval by the Internal Revenue Service" of any application for section 501(c)(3) status; and (7) the identities of the presidents and executive secretaries of the Catholic conferences in sixteen states, and the identities of the bishops and directors of pro-life activities in eighteen dioceses for the years 1975 to the present. See Joint Appendix in No. 87-416, at pages 70-71.

USCC/NCCB declined to comply with those subpoenas, asserting, *inter alia*, that petitioners lacked standing to sue and the district court therefore lacked judicial power to issue and enforce subpoenas. The district court held that the petitioners had standing to sue and held USCC/NCCB in contempt, fining them a total of $100,000 per day for each day the subpoenaed documents were not produced. The fines were stayed pending appeal.

The court of appeals initially affirmed the contempt judgment without resolving USCC/NCCB's challenge to the petitioners' standing. The court held that USCC/NCCB, as witnesses, lacked standing to challenge the plaintiffs' standing. *In re United States Catholic Conference*, 824 F.2d 156 (2d Cir. 1987). This Court reversed and remanded, directing the court of appeals to determine whether the plaintiffs had standing to challenge the Church's tax exemption. *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988). On remand, the court of appeals held that the petitioners lacked standing to sue, vacated the contempt

judgment against USCC/NCCB, and ordered that the complaint be dismissed. Pet. App. 1a.

Petitioners moved for rehearing, alleging that the court of appeals' decision created an intra-circuit conflict with *Fulani, supra.* The panel rejected that contention and denied rehearing in a unanimous, *per curiam* opinion. Pet. App. 85a-86a. The Court later denied rehearing *en banc.* That order, which is omitted from petitioners' appendix, notes that no judge requested a vote on petitioners' suggestion. A copy of the order is included as an appendix to this brief. The present petition followed.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' DECISION ACCORDS WITH THIS COURT'S DECISIONS REJECTING THIRD-PARTY TAX CHALLENGES.

Lawsuits challenging the tax status of others "are rarely if ever appropriate for federal-court adjudication." *Allen* v. *Wright*, 468 U.S. 737, 760 (1984). That is so for two reasons. First, private plaintiffs are seldom, if ever, able to claim a direct injury based on the government's alleged failure to enforce the tax code against another. Second, judicial inquiries into the tax status of third parties (in this case, 30,000 of them), accompanied by all the discovery devices of civil litigation, would disrupt the elaborate statutory framework established by Congress for enforcing the tax code. That framework includes authorization for declaratory judgment actions determining an organization's eligibility for a tax-exemption under section 501(c)(3), but such an action "*may be filed . . . only by the organization the qualification or classification of which is at issue.*" 26 U.S.C. § 7428(b)(1) (emphasis added); see also 28 U.S.C. § 2201(a).

The petitioners ignore the two decisions by this Court that are most relevant to their petition—the two cases in which the Court has considered, and denied, standing to challenge another entity's tax exempt status, *Allen* v. *Wright*, *supra*, and *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). Together, those cases establish that " 'litigation concerning tax liability is a matter between taxpayer and IRS, with the door barely ajar for third party challenges.' " *Allen*, 468 U.S. at 748-49, quoting 656 F.2d 824, 828 (D.C. Cir. 1981).

In *Simon*, which petitioners fail to cite, various indigent persons challenged a revenue ruling that a non-profit hospital could qualify for recognition as a charitable organization under § 501(c)(3), even though it provided only emergency room services to those unable to afford hospitalization. This Court acknowledged the plaintiffs' interest in obtaining hospital services, and even acknowledged that some plaintiffs had been injured by the hospitals in question. *Id.* at 40-41. Nevertheless, the Court held that those facts were insufficient to establish a case or controversy with the Treasury. It was "purely speculative," the Court explained, whether the alleged denial of medical services to indigents "fairly can be traced to [the IRS's action] or instead result from decisions made by the hospitals without regard to the tax implications." 426 U.S. at 42-43. "[E]qually speculative" was the question whether a judgment against the IRS would cause the hospitals to provide more free services or instead to forego their tax exemptions. *Id.* at 43. Thus, the plaintiffs failed " 'to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective

relief [would] remove the harm.'" *Id.* at 45, quoting *Warth* v. *Seldin*, 422 U.S. 490, 505 (1975).

In *Allen*, which the petitioners cite only for the general proposition that separation of powers principles underlie the standing requirements, this Court held that parents of black public school children lacked standing to challenge the lawfulness of the IRS's grant of tax exempt status to allegedly discriminatory private schools. The plaintiffs in *Allen* claimed that they had standing because the government's administration of the tax laws "diminished [their childrens'] ability to receive an education in a racially integrated school." 468 U.S. at 756. The Court recognized the "serious" nature of that injury, and "the constitutional importance of curing" it, but held that the injury could not support standing because it was "not fairly traceable to" the challenged granting of tax exemptions. *Id.* at 756-57. It was "entirely speculative," the Court explained, "whether withdrawal of a tax exemption from any particular school would lead the school to change its policies." *Id.* at 758. It was "just as speculative whether any given parent would decide to transfer [his or her] child to public school" as a result of the school's loss of its tax-exempt status. *Ibid.* And it was "pure speculation" whether a sufficiently large number of such decisions would be made in order to have a "significant impact on the racial composition of the public schools." *Ibid.*[8]

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[8] This Court has likewise denied standing, outside of the tax context, to private individuals seeking to challenge government decisions not to prosecute a third party. In *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973), the court denied standing to a woman who wished to challenge the nonprosecution of her child's father for failure to pay child support. It was

The plaintiffs in *Allen* also alleged that they were denigrated "by the mere fact of Government financial aid to discriminatory private schools." *Id.* at 752. This Court rejected the notion that standing could be predicated upon such a generalized claim of stigma. It held that "[t]here can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing . . . . Our cases make clear, however, that such injury accords a basis for standing *only to those persons who are personally denied equal treatment* by the challenged discriminatory conduct." *Id.* at 755 (emphasis added, internal quotations, citations omitted).

The court of appeals in this case correctly held that petitioners had "not pleaded that they were personally denied equal treatment," and that they had failed to claim any "particularized injury in fact." Pet. 24a. Consequently, it never reached the question whether petitioners' alleged injuries were fairly traceable to the IRS or redressable by a judgment against the IRS. Pet. App. 26a. It is plain, however, that petitioners' claim of injury fails on these grounds as well.

Petitioners claim that their political effectiveness has been impaired by what they allege to be the Church's subsidized political activity. But here, as in *Simon* and *Allen*, "[s]peculative inferences are necessary to connect [petitioner's alleged] injury to the challenged actions of [the IRS]." *Simon*, 426

"only speculative," Justice Marshall wrote for the Court, that such prosecution would result in the payment of support. *Id.* at 618. And "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.* at 619.

U.S. at 45. It is speculative whether, or to what extent, the Church's donors would reduce their contributions if the Church's tax exemption were revoked. As plaintiffs themselves allege, contributions to the Church are "religiously-compelled," Am. Compl. ¶ 26, and therefore may not be responsive to tax pressure. It is equally speculative whether the Church would decide to stop the religiously motivated activities that are under attack, such as "distribut[ing] 'right-to-life' leaflets with . . . church bulletin[s]," *id.* ¶ 46, and whether, even if it did, its members would not feel an obligation to fill the void. Finally, it is speculative in the extreme whether all of the foregoing would lead to fewer pro-life votes.[9]

In short, it is true here, as it was in *Allen* and *Simon*, that

> [f]rom the perspective of the IRS, the [plaintiffs' claimed] injury . . . is highly indirect and "results from the independent action of some third party not before the court . . . ."

Allen, 468 U.S. at 757, quoting *Simon*, 426 U.S. at 42.

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[9] Petitioners have effectively conceded as much, arguing that it is "irrelevant . . . whether the Church will continue to be active politically or if its members will increase their donations" in the event of a judgment in petitioners' favor. See Respondents' Brief in Opposition in No. 87-416, at 54. But if a judgment against the IRS would not alter the alleged political activities of the Church and its contributors, then the petitioners would gain nothing other than the psychological pleasure of knowing that the Church has lost something—its tax exemption. And as this Court has made clear, such vindictive pleasure alone is insufficient to support standing. *Allen*, 468 U.S. at 754; *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 482-87 (1982); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 217, 226-27 (1974).

Of course, the fact that the Church entities whose alleged political activities have allegedly injured the plaintiffs, and whose tax status is at issue, are "not before the court," *ibid.*, ensures that a judgment in the plaintiffs' favor would accomplish virtually nothing. Because the Church entities are not parties, they would not be bound by any judgment. They would be entitled to litigate their tax-exempt status *de novo* in a separate declaratory judgment action under 26 U.S.C. § 7428. That fact only underscores the inappropriateness of allowing this case to go forward.

In short, there is nothing surprising or noteworthy about the court of appeals' decision in this case. In fact, a contrary decision would have worked a minor revolution in the law.[10]

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER COURT OF APPEALS.

In an attempt to find something about the court of appeals' decision to warrant this Court's attention,

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[10] The lower courts also have been nearly unanimous in rejecting third-party challenges to tax exemptions. See *Khalaf* v. *Regan*, 85-1 U.S. Tax Cas. (CCH) ¶ 9269 (D.D.C. 1985), *aff'd*, No. 83-02963 (D.C. Cir. Sept. 19, 1986) (unpublished opinion) (individuals and non-exempt political advocacy groups lack standing to claim that tax-exempt status accorded to Jewish organizations disadvantaged them in pursuit of their political objectives); *American Society of Travel Agents, Inc.* v. *Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978) (travel agents lack standing to challenge the tax exempt status of the American Jewish Congress for engaging in competitive business activity allegedly prohibited by § 501(c)(3)). The sole exception is another opinion of the Second Circuit that the panel in the present case unanimously held did *not* conflict with its opinion. See *supra*, at 2, *infra* at 20-22 & n.17.

petitioners argue that the decision conflicts with standing decisions of this Court in cases having nothing to do with third-party tax challenges. None of the petitioners' supposed "conflicts" withstands scrutiny.

A. *Baker* v. *Carr*

The lower court's decision plainly does not conflict with *Baker* v. *Carr*, 369 U.S. 186 (1962). Unlike the plaintiffs there, petitioners here do not allege any diminution in their representation. Nor do they allege gerrymandering, ballot-box-stuffing, outright denial of their right to vote, or anything else that dilutes the strength of their votes.[11] Petitioners have thus suffered no injury to their right to *vote*, and the court of appeals correctly held "that *Baker* v. *Carr* and its progeny are inapposite and provide no basis for granting standing to these plaintiffs." Pet. App. 21a.

As the court of appeals recognized, the petitioners here do not actually rest their claim of standing upon their status as voters. Rather, they claim standing as "political participants" or "competitive advocates," whose effectiveness has allegedly been impaired by a "distortion in the political process." As the petitioners see it, the content—or, more precisely, the balance—of the political debate has been tilted by the government's alleged failure to revoke the Catholic Church's tax exemption. This claim of "distortion in the political process" is a far cry from the direct impairment of the right to vote that supported the plaintiffs'

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[11] Cf. *Davis* v. *Bandemer*, 478 U.S. 109 (1986); *Karcher* v. *Daggett*, 462 U.S. 725 (1983); *Wiley* v. *Sinkler*, 179 U.S. 58 (1900); *United States* v. *Saylor*, 322 U.S. 385 (1944).

standing in *Baker* v. *Carr* and its progeny. And no decision of this Court provides the slightest support for such a standing claim. To the contrary, this Court has rejected comparable claims of standing, based on alleged distortions of political processes, in *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974), and *United States* v. *Richardson*, 418 U.S. 166 (1974).

In *Schlesinger*, a group of self-described "citizens" complained that allowing Armed Forces Reserve members to sit in Congress violated the Incompatibility Clause of the Constitution, which states that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const., Art. I, § 6, cl. 2. The alleged injury was a distortion of the political process in the form of "undue influence by the Executive Branch" on Reservist Members of Congress. 418 U.S. at 212. That allegation, the Court held, although concededly a matter in which citizens have "an interest," was "too abstract to constitute a 'case or controversy' appropriate for judicial resolution." *Id.* at 226-27.

In *Richardson*, the Court denied standing to a taxpayer who wished to challenge a provision of the Central Intelligence Agency Act of 1949 that permitted the Agency's budget to be kept secret. The plaintiff in *Richardson* argued that such secrecy violated Art. I, § 9, cl. 7 of the Constitution, which provides in part, that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." The plaintiff's alleged injury was a distortion of the political process —he claimed that "without detailed information on CIA expenditures . . . he [could] not . . . properly

fulfill his obligations as a member of the electorate in voting for candidates seeking national office." 418 U.S. at 176. This Court held that alleged impairment insufficient to confer standing.[12] The "distortion in the political process" that petitioners allege here is no less amorphous than the alleged distortions found insufficient in *Schlesinger* and *Richardson.*

The court of appeals' decision also agrees with those of other courts of appeals. In *Winpisinger* v. *Watson*, 628 F.2d 133 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980), the United States Court of Appeals for the District of Columbia Circuit held that supporters of Senator Edward Kennedy for the Democratic presidential nomination lacked standing to claim that members of President Carter's administration had illegally spent federal funds to promote the

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[12] *Ex parte Levitt*, 302 U.S. 633 (1937), is to the same effect. In that case, a citizen and member of this Court's bar sought to challenge the President's appointment and the Senate's confirmation of Justice Black as a violation of Art. I, § 6, cl. 2 of the Constitution, which provides that "[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time . . . ." Seating a constitutionally ineligible Justice on this Court would quite arguably "distort" the judicial process. Nevertheless, this Court unanimously denied Mr. Levitt's motion for a writ of *quo warranto*, and held that it "is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." 302 U.S. at 634. See also *Richardson*, 418 U.S. at 177-78 (summarizing *Levitt*).

President's renomination. The plaintiffs' alleged harm was "the dilution of their efforts on Senator Kennedy's behalf by the actions of the federal defendants in utilizing the vast resources available to the Administration to promote President Carter's quest for renomination." *Id.* at 138. The Court held that there was no fairly traceable causal connection between the claimed injury and the challenged conduct. It explained that

> [t]he endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions forecloses any reliable conclusion that voter support of a candidate is "fairly traceable" to any particular event. In the case before us, whether [a plaintiff] is viewed in the character of a voter, contributor, a noncontributing supporter or a candidate for a delegate post, a court would have to accept a number of very speculative inferences and assumptions in any endeavor to connect his alleged injury with activities attributed to [the defendants]. Courts are powerless to confer standing when the causal link is too tenuous.

Id. at 139.

Likewise, in *Shakman* v. *Dunne*, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 484 U.S. 1065 (1988), the Seventh Circuit denied standing to candidates and voters challenging the politically motivated hiring of government employees in Chicago. Like the petitioners here, the plaintiffs there alleged that the challenged action "created . . . inequality in the treatment of communication," "giving the appellants a significant advantage in the process of communicating with the

electorate." *Id.* at 1396. The Seventh Circuit rejected that claim as an insufficient basis for standing. *Id.* at 1397.

The court of appeals in this case thus broke no new ground when it held that the "distortion" of the political process alleged by the petitioners is insufficient to give them standing.

B. Establishment Clause Cases

Petitioners claim that the court of appeals' decision conflicts generally "with this Court's definition of injury in Establishment Clause cases." Pet. 28. It does no such thing.[13]

Under the Establishment Clause, petitioners say, the "injury is the discrimination itself." Pet. 29. But that is nearly identical to the claim expressly rejected by this Court in *Allen*. There, the plaintiffs claimed that the "mere fact of Government financial aid to discriminatory private schools" caused a "stigmatizing injury." 468 U.S. at 752, 755. This Court rejected that claim, and held that "such injury accords a basis for standing *only to those persons who are personally denied equal treatment* by the chal-

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[13] Petitioners also include in their question presented the issue whether they have standing as taxpayers. But they do not elaborate on that claim in their petition itself. The court of appeals' decision that they lack such standing, Pet. App. 17a-19a, is both eminently correct and thoroughly unremarkable. Unlike the plaintiffs in *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), plaintiffs here do not challenge § 501(c)(3), or any other statute, either on its face or as applied. Instead, they argue that § 501(c)(3) is being violated, and they seek to enforce it privately.

lenged discriminatory conduct." *Id.* at 755 (emphasis added, internal quotations and citation omitted).[14]

The same standard applies with equal force under the Establishment Clause. In *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982), the Court denied standing to individual citizens who wished to challenge the government's conveyance of surplus federal property to a religious college. The Court explicitly rejected the notion "that enforcement of the Establishment Clause demands special exceptions from the requirement that a plaintiff allege 'distinct and palpable injury to himself' . . . that is likely to be redressed if the requested relief is granted." 454 U.S. at 488 (citations omitted). Thus, the Court emphasized that a claimed "spiritual stake" in the government's alleged preference for a particular religion cannot support standing unless the plaintiffs can show that they were " '*directly affected* by the laws and practices against which their complaints are directed.' " 454 U.S. at 486-87 n.22, quoting *Abington School District* v. *Schempp*, 374 U.S. 203, 224 n.9 (1963) (emphasis added).

The schoolchildren in *Schempp* were "directly affected" by the schools' Bible-reading programs because they "were subject to unwelcome religious exercises or were forced to assume special burdens to

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[14] The suggestion of stigma or denigration in this case (see note 15, *infra*), pales by comparison to the comparable allegation rejected in *Allen*. The plaintiffs in *Allen* complained of racial discrimination, which historically has carried with it an undeniable mark of perceived inferiority. The allegation of stigma in *Allen*, while too generalized to support standing, was nonetheless genuine. By contrast, the suggestion of "denigration" here is baseless.

avoid them." 454 U.S. at 487 n.22. By contrast, the plaintiffs in *Valley Forge* lacked standing because they

> fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.

454 U.S. at 485-86 (emphasis in original). The court of appeals here correctly determined that the petitioners' complaint suffers from the same fatal defect. Petitioners have not been "personally denied equal treatment," *Allen*, 468 U.S. at 755, nor have they been "directly affected by the . . . practices against which their complaints are directed." *Valley Forge*, 454 U.S. at 486-87 n.22. Their claim of standing rests ultimately on their assumption—unsupported by any alleged facts—that the government *would* treat them differently from the Catholic Church *if* they behaved as they say the Catholic Church has. Such speculation, however, cannot provide a basis for standing.[15]

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[15] Petitioners' statement that they are "not . . . seeking standing as 'clergy *qua* clergy' with all the negative implications" of that argument (Pet. at 32 n.10), is somewhat mystifying. That has always been their claim in the past. For example, in their previous brief on the merits in this Court, petitioners insisted that the clergy plaintiffs suffered injury "in the daily practice of [their] ministries, in their ability to gain public acceptance of their religious beliefs and to minister to their congregations' particular needs . . . ." *U.S. Catholic*

Nor does the court of appeals' opinion conflict with any of the other cases cited by petitioners. Although this Court did not address any question of standing in *County of Allegheny* v. *A.C.L.U. Greater Pittsburgh Chapter*, 109 S.Ct. 3086 (1989), or *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), the records in those cases make clear that they were predicated upon municipal taxpayer standing, not upon the nebulous theory offered by the petitioners here. See Joint Appendix in No. 87-2050, Amended Complaint ¶¶ 2-9, 16, 23; Joint Appendix in No. 82-1256, Amended Complaint ¶¶ 1, 4-7, 14. *Texas Monthly, Inc.* v. *Bullock*, 109 S.Ct. 890 (1989), was a challenge, under the Press and Establishment Clauses, to a statutory tax exemption enjoyed only by religious periodicals. It was brought by a secular newspaper in the context of its own demand for a tax refund. *Id.* at 895. And *Larson* v. *Valente*, 456 U.S. 228 (1982),

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Conference v. *Abortion Rights Mobilization, Inc.*, No. 87-416, Brief for Respondents at 75. And in their initial filing with the court of appeals, they quoted with approval from the district court's description of the alleged injury they suffer:

> The clergy plaintiffs have devoted their lives to religious communities and beliefs that are denigrated by government favoritism to a different theology. They provide spiritual leadership to and care for the spiritual needs of their congregations. As part of these duties, they must counsel those in their care in accordance with religious laws which command consideration of abortion as the morally required response to pregnancy.

Abortion Rights Mobilization, Inc. v. *Baker*, No. 85-3056 (2d Cir.), Respondents' Brief at 37.

If petitioners are now abandoning their claim of "clergy standing," it is unclear on what basis they *do* seek standing under the Establishment Clause.

was a suit brought by a religious denomination that was required by statute to file certain fundraising reports from which other religions were statutorily exempted. Here, both petitioners and respondents are equally subject to the terms of § 501(c)(3) and to all related regulations. None of the petitioners seeks a tax refund or any change in tax status. And just as the government has taken no enforcement action against USCC/NCCB, neither has it taken any against any of the petitioners.[16]

In short, not only does the court of appeals' decision not conflict with this Court's Establishment Clause precedents, it is squarely in their mainstream.

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[16] All of the Court's other Establishment Clause cases have likewise been predicated either on taxpayer standing or some other sort of direct injury. See, *e.g.*, *Jimmy Swaggart Ministries* v. *Bd. of Equalization*, 110 S.Ct. 688 (1990) (sales tax levied against religious organization); *Hernandez* v. *Commissioner*, 109 S.Ct. 2136 (1989) (taxpayers denied deduction for payments for church services); *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987) (employee allegedly victimized by religious discrimination); *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985) (employer required by statute to grant employees Sabbath leave); *Wallace* v. *Jaffree*, 472 U.S. 38 (1985) (children subjected to religious exercise); *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (legislator subjected to legislative Chaplain's prayers); *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982) (restaurant denied liquor license); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) (public school teacher forbidden to teach evolution); *Abington School Dist.* v. *Schempp*, 374 U.S. 203 (1963) (schoolchildren subjected to Bible reading); *Engel* v. *Vitale*, 370 U.S. 421 (1962) (schoolchildren subjected to prayer); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961) (candidate for office required to affirm faith in God); *McGowan* v. *Maryland*, 366 U.S. 420 (1961) (retail clerks convicted of doing business on Sunday).

III. THERE IS NO INTRA-CIRCUIT SPLIT IN THE SECOND CIRCUIT.

Petitioners insist that there is a conflict within the Second Circuit that warrants this Court's attention. They claim—incorrectly—that the present case is irreconcilable with *Fulani* v. *League of Women Voters Educ. Fund*, 882 F.2d 621 (2d Cir. 1989). Of course, the place to resolve an intra-circuit split is in the Circuit itself, not in this Court. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974). Recognizing that fact, the petitioners sought rehearing in the court of appeals on this ground, but even the dissenting judge on the panel found no conflict. See Pet. App. 85a-86a.[17]

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[17] In *Fulani*, a divided panel of the court of appeals held that an independent presidential candidate, Dr. Laura B. Fulani, had standing to challenge the tax exempt status of the League of Women Voters, which had left her out of its nationally televised candidate debates leading up to the Democratic and Republican presidential nominations. 882 F.2d at 623. Nevertheless, the court affirmed the district court's dismissal of the complaint for failure to state a claim. The Second Circuit's ruling on standing was explicitly rejected in a substantially identical suit brought by Dr. Fulani in the District Court for the District of Columbia. *Fulani* v. *Brady*, 727 F. Supp. 158 (D.D.C. 1990), *notice of appeal filed* (Feb. 27, 1990). Whichever of the two *Fulani* decisions is correct, the cases are distinguishable from this case. In *Fulani*, at least, one of the defendants, the League of Women Voters, had in fact treated the plaintiff differently from other candidates. It had denied her the opportunity to participate in its debates. Here, by contrast, there has been no unequal treatment of any of the plaintiffs by any of the defendants. Moreover, in *Fulani*, the requirements of 11 C.F.R. §§ 1.10.13, 114.4(e) (1988), that the League maintain its tax-exempt status in order to sponsor candidate debates, at least arguably supplied the elements of "traceability" and "redressability" necessary for standing—

IV. THE COURT OF APPEALS' OPINION IS NARROW AND FACT-BOUND.

Petitioners mistakenly suggest that the court of appeals' opinion is an expansive one. It is not. In fact, the court of appeals was careful to stress the narrowness of its holding: "[w]e do not foreclose the possibility that political competitors might state a cognizable injury; instead, we simply hold that the theory cannot be sustained here." Pet. App. 26a. The court explained that its decision adhered closely to "the pleaded facts and established law, and [did] not venture out any further" than was necessary. *Id.* In short, the court's opinion is both narrow and fact-bound.

What is more, the facts to which the court's opinion is bound are extreme. Petitioners are not candidates, or even supporters of candidates for any particular office, much less in any particular election. None of the petitioners is a disappointed applicant for a tax exemption of its own. None is the target of IRS enforcement activities. And none seeks a tax refund. The court of appeals deliberately decided only that *these* plaintiffs, on *this* complaint, do not have standing. It did not decide whether any of the above permutations would make a difference to its decision, and it certainly did not rule on any of the fanciful hypotheticals posited by petitioners' *amici*.[18]

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if the League lost its tax exemption, it could not sponsor a candidate debate. Here, as in *Simon* and *Allen*, it is entirely speculative whether the conduct of the Catholic Church and its contributors would change in any way, much less in a way agreeable to petitioners, in the wake of a revocation of the Church's tax-exempt status.

[18] Additional abortion-rights groups have filed an *amicus* brief supporting the petitioners. Only a few of *amici*'s argu-

CONCLUSION

The court of appeals' decision does not conflict with any decision of this Court or of any court of appeals. Instead, the court of appeals simply applied this Court's precedents to a narrow set of facts and left

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ments warrant a response. First, *amici* recite a litany of hypothetical horribles in which the IRS purposefully permits tax-exempt organizations to support candidates advocating all sorts of causes—from legalizing racial segregation to outlawing traditional religions. Brief *Amicus Curiae* of Population Planning Associates, Inc. ("Br. Am. Cur."), at 6. As noted above, the short answer to all those hypotheticals is that the court of appeals expressly refused to decide that political competitors would never have standing. It thus left many questions—including all of *amici*'s hypotheticals—for another day.

Second, it is simply inaccurate to say, as *amici* do, that this Court "expressly acknowledged" in its prior opinion in this case that the petitioners' standing "is at least 'colorable.' " Br. Am. Cur. at 15. What the Court said—in the fourth sentence of its opinion—is that the *court of appeals* in its prior opinion ruled "that a non-party witness' jurisdictional challenge is limited to a claim that the District Court lacks even colorable jurisdiction, *a standard not met here.*" 487 U.S. at 74 (emphasis added). Quite obviously, the Court was simply describing the court of appeals' ruling, not offering its own assessment of the plaintiffs' standing.

Third, *amici* announce that "in some respects, the standing of the plaintiffs in this case follows *a fortiori* from the standing of the plaintiffs" in *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987). Br. Am. Cur. at 10. Hardly. In *Ragland*, the plaintiff raised its constitutional challenge to other publications' tax exemptions in the context of its own claim to an exemption and its own suit for a tax refund. See 481 U.S. at 225. The plaintiffs in *Ragland* could plausibly allege that they had been treated differently by the government by being denied the exemptions granted to the others. See also *Texas Monthly, supra*; *Regan* v. *Taxation With Representa-*

the state of the law exactly as it found it—" 'suggest[ing] that litigation concerning tax liability is a matter between taxpayer and IRS, with the door barely ajar for third party challenges.' " *Allen*, 468 U.S. at 748-49, quoting 656 F.2d 820, 828 (D.C. Cir. 1981). Cf. Pet. App. 26a. Accordingly, the petition should be denied.

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tion, 461 U.S. 540 (1983). Here, no petitioner has been denied any exemption and none seeks any refund.

Fourth, *amici* mistakenly suggest that *Lujan* v. *National Wildlife Fed'n*, No. 89-640, which is currently set for oral argument on April 16, 1990, is somehow relevant to this case. Br. Am. Cur. at 20. As *amici* concede, however, "*Lujan* arises in the context of environmental litigation and is in other respects dissimilar from this case." *Ibid.* *Lujan* arises under the Administrative Procedure Act, under which prudential standing limitations play far less of a role. See *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 400 n.16 (1987). Here, however, they could well play an important role, see *Allen*, 468 U.S. at 751, and the court of appeals expressly left those prudential standing questions open. Pet. App. 26a. In addition, the governmental actions challenged in *Lujan* are formal decisions, published in the Federal Register, opening public lands to private mining interests. They are, in short, the classic sort of decisions reviewable under the APA. The only question in *Lujan* is whether the particular plaintiffs in that case are the proper parties to invoke judicial review. Here, there is no governmental action at all, merely an absence of enforcement, against petitioners or respondents. In contrast to the garden-variety challenge to administrative acts at issue in *Lujan*, the question in this case is one that is "rarely if ever appropriate for federal-court adjudication." *Allen*, 468 U.S. at 760.

Respectfully submitted,

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April 6, 1990

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of November one thousand nine hundred and eighty-nine.

Docket No. 86-6092

IN RE: UNITED STATES CATHOLIC CONFERENCE and NATIONAL CONFERENCE OF CATHOLIC BISHOPS,

Appellants,

ABORTION RIGHTS MOBILIZATION INC., LAWRENCE LADER, MARGARET O. STRAHL, M.D., HELEN W. EDEY, M.D., RUTH P. SMITH, NATIONAL WOMENS HEALTH NETWORK, INC., LONG ISLAND NATIONAL ORGANIZATION FOR WOMEN-NASSAU, INC., RABBI ISRAEL MARGOLIES, REVEREND BEA BLAIR, RABBI BALFOUR BRICKNER, REVEREND ROBERT HARE, REVEREND MARVIN G. LUTZ, WOMENS CENTER FOR REPRODUCTIVE HEALTH, JENNIE ROSE LIFRIERI, EILEEN WALSH, PATRICIA SULLIVAN LUCIANO, MARCELLA MICHALSKI, CHRIS NIEBRZYDOWSKI, JUDITH A. SEIBEL, KAREN DECROW and SUAN SHERER,

Plaintiffs-Appellees,

-v.-

JAMES A. BAKER, III, Secretary of the Treasury, and ROSCOE L. EGGER, JR., Commissioner of Internal Revenue,

Defendants.

A petition for rehearing [having been] filed herein by counsel for the plaintiffs-appellees, ABORTION RIGHTS MOBILIZATION INC., ET AL., and the panel that heard the appeal having denied said petition for rehearing in an opinion filed on October 4, 1989,

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

By /s/ Tina Eve Brier
TINA EVE BRIER
Chief Deputy Clerk